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No. 92-1708

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

DEFENDER INDUSTRIES, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

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The petition in this case demonstrates (1) that the Fourth Circuit follows an aberrant rule, purportedly required by the Seventh Amendment, in punitive damages cases tried in diversity, and (2) that the $5 million in punitive damages awarded here violates the due process clause. We argued that both issues merit review and that, at a minimum, the case should be held pending disposition of *TXO Production Corp. v. Alliance Resources Corp.*, No. 92-479. Respondents attempt to avoid scrutiny of the Seventh Amendment issue by suggesting that the Fourth Circuit's unique rule was not followed in this case and that the issue is not properly presented in this Court. As for our second claim, respondents first attempt, unconvincingly, to justify the $5 million punitive award, and then proffer superficial distinctions between this case and *TXO*. None of these arguments—much less the empty verbal jousting littered throughout respondent's

brief in opposition—provides a proper basis for denying review or, alternatively, holding the case pending *TXO*.

1.a. Respondents first claim that the courts below actually followed South Carolina standards and procedures just as they would have been applied in a state court punitive damages case. Br. in Opp. 8-14. This argument is wrong and, indeed, flatly contradicted by the district court's opinion, on which *respondents* claim to rely. In *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), the Fourth Circuit clearly held that the post-verdict judicial review process adopted by the South Carolina Supreme Court in *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991), in response to this Court's decision in *Pacific Mutual Life Insurance Co. v. Haslip*, 111 S. Ct. 1032 (1991), could *not* be applied in federal court because of the Seventh Amendment. *See* Pet. 10-12. *Mattison* was followed in this case and its significance fully appreciated. The district court directly acknowledged that "[t]he *Mattison* decision significantly altered the law of punitive damages." Pet. App. 8a. In particular, confirming our position, the court explained: "The Fourth Circuit was unable to establish a post-trial review mechanism, as the South Carolina Supreme Court had done in *Gamble*, because a federal district court's review of a jury verdict is subject to Seventh Amendment constraints which are not imposed on any state-prescribed post-trial review." *Id.* at 12a.

As we explained in the petition (at pp. 10-11), the main difference between the South Carolina procedure and the procedure mandated for federal courts in *Mattison* is in the degree of independence exercised by the trial judge in reviewing punitive damage awards. In state court, the jury is not told about the eight *Gamble* factors; rather, these factors are applied in the first instance by the trial court, which makes its own relevant findings. In federal court, by contrast, the factors are applied by the jury, and that application is deferentially reviewed by the trial judge.

The district court not only recognized this basic difference between *Gamble* and *Mattison*; it specifically implemented the distinction when it reviewed the punitive award in this case. The court made no independent review of the evidence but, rather, frankly acknowledged that "[its] opinion recites the evidence in the light most favorable to Defender." Pet. App. 28a n.8. And, to the same effect, the court approved an award that it characterized as "the *maximum* that this court finds a reasonable jury could award in light of the evidence in this case." *Id.* at 31a (emphasis in original). *Gamble* would have authorized, if not mandated, much more careful scrutiny and analysis. *See* Pet. 15.[1]

In sum, *Mattison* plainly requires federal courts applying South Carolina law to follow a *different* approach from state courts in punitive damages cases. As we explained in the petition, moreover, the *Mattison* rule conflicts with the approaches followed in the Eleventh and Fifth Circuits, both of which require federal judges to apply the identical criteria used by state judges to review punitive awards, even if those criteria diverge from the standards given to the jury. *See* Pet. 12.[2] The Fourth

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[1] Further attempting to marginalize the significant distinctions between *Mattison* and *Gamble*, respondents incorrectly characterize *Caldwell v. K-Mart Corp.*, 410 S.E.2d 21, 25 (S.C. Ct. App. 1991), as confirming that substantial deference is accorded to jury verdicts in state court. In fact, what *Caldwell* confirmed was that trial judges have the "power and responsibility" to set aside any punitive verdict that they consider "unduly liberal." *Id.* at 24-25. This is the very standard that was relied on by the South Carolina Supreme Court in *Gamble*, as it set out eight factors to guide the trial court's review. *See* 406 S.E.2d at 354.

[2] Respondents attempt unsuccessfully to harmonize these decisions with *Mattison* by ignoring the fact that the Fourth Circuit expressly bars a federal court from adopting any state procedure under which the court "evaluate[s] a jury's verdict based . . . on a legal standard not given to the jury." 947 F.2d at 108. That is precisely what the Fifth and Eleventh Circuits have required.

Circuit's Seventh Amendment analysis is also wrong.[3] It should be reviewed by this Court.

b. Respondents further argue, with respect to the *Mattison* issue, that "Northwestern took the contrary position below and has therefore waived its objection." Br. in Opp. 15. This argument is misleading and incorrect. It is true that in the district court petitioner acknowledged that *Mattison* governed; after all, the case was binding precedent in the Circuit and to argue otherwise would have been futile. But petitioner further argued that *Mattison* did *not* allow the jury to consider the defendant's financial condition, except to the limited extent of assuring that an award does not bankrupt the defendant. *See* Pet. App. 10a-13a. The district court then rejected that reading and instructed the jury to take into account petitioner's wealth. *Ibid.*

On appeal, petitioner urged its reading of *Mattison* as a basis for reversal, while preserving the alternative argument that "[i]f *Mattison* did not remove wealth from the penalty formula, its revision of *Gamble* was [constitutionally] impermissible." Br. of Appellant at 14 n.6. It explained that it offends due process to tell a jury to consider the wealth of a multi-billion-dollar company (along with other unrelated factors), and then to review whatever verdict emerges under deferential federal stand-

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[3] Respondents virtually concede that, under *Tull v. United States*, 481 U.S. 412 (1987), there is no Seventh Amendment right to a jury trial on the amount of punitive damages to be awarded in a case. Br. in Opp. 19. They argue, however, that if the issue *is* presented to the jury, any review of the jury's award is constrained by the second clause of the Amendment, which states that "no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." *Ibid.* This makes little sense. It stands to reason that the second clause was merely intended to prevent evasion of the right to a jury trial created in the first clause. The two clauses should therefore be seen as coextensive in terms of the situations where they come into play.

ards rather than "quasi-*de novo*" state standards. *Id.* at 28-31. In the course of making this argument, it specifically asserted that such due process concerns should take precedence over the Seventh Amendment. *Id.* at 29 n.28. *See also id.* at 14 n.6 (noting the *Erie* issue created by *Mattison*). The Fourth Circuit, however, ruled that the district court had "properly decided the legal issues," and that the court's "determination of the appropriate amount of the nisi verdict was not . . . a denial of due process." Pet. App. 5a.

On this record, petitioner did what was necessary to preserve the challenge to the *Mattison* rule, which was applied to this case and which we now ask this Court to review. While petitioner did not argue the Seventh Amendment issue at any length, it would have been useless to do so: both the district court and the Fourth Circuit panel were bound by *Mattison* and, before briefing was completed in the court of appeals, the Fourth Circuit, *en banc*, had expressly adopted the Seventh Amendment analysis of *Mattison* and applied it to Virginia cases in federal court. *See Johnson v. Hugo's Skateway*, 974 F.2d 1408 (4th Cir. 192) (*en banc*).[4] This petition thus constitutes the first time that petitioner had an opportunity to challenge *Mattison* directly. In such a context, surely it must be sufficient to preserve an issue by calling it to the attention of the court of appeals. *Cf. United States v. Williams*, 112 S. Ct. 1735, 1740 (1992) (refusing to require that "a party demand overruling of a squarely applicable, recent circuit precedent, even though that precedent was established . . . over the party's vigorous objection . . . and even though no 'intervening developments in the law' . . . had occurred"); *Sure-Tan, Inc.*

[4] Respondents' suggestion that *Johnson* calls into question the continuing validity of the *Mattison* approach is contradicted by the very language from *Johnson* that they quote, which makes clear that, unlike in state court, in federal court the jury, not the judge, is the "sole fact finder" on punitive damages. Br. in Opp. 18 (quoting *Johnson*, 974 F.2d at 1416).

v. NLRB, 467 U.S. 883, 896 n.7 (1984) (party allowed to assert issue not previously raised, in light of intervening decision that made the claim substantial); *Standard Indus., Inc. v. Tigrett Indus., Inc.*, 397 U.S. 586, 587-88 (1970) (Black, J., dissenting) (same) (citing cases).

2. Turning to the second issue—the constitutional excessiveness of the punitive award—respondents make essentially three points. First, they argue that the petition is deficient because it fails to propose specific standards for substantive due process review of punitive damage awards. Br. in Opp. at 21. In fact, however, petitioner simply suggested that this would be a good case in which to develop such standards, while properly deferring further discussion of that merits issue until after review is granted.

Second, respondents attempt to defend the $5 million penalty here on the ground that (1) it is less than the $25 million the jury initially awarded (*id.* at 22), and (2) it is commensurate with the potential damage associated with a threat made by petitioner's agent (*id.* at 23). As noted in the petition, however, the district court selected the $5 million as the maximum amount that a rational jury could award, taking into account petitioner's immense "ability to pay." Pet. 19 n.18. This case thus represents a paradigmatic example of a "windfall" occasioned by the "good fortune [of having] a defendant with a deep pocket." *Haslip*, 111 S. Ct. at 1045.

As for the "threat," it is noteworthy that respondents are now defending the judgment below by reference to a tort *other than* the commercial fraud charged in the complaint and found by the jury. In so doing, moreover, they ignore the fact that the sole alleged purpose of this threat—made by an agent and wholly unknown to petitioner—was to induce Defender to maintain in full force a policy paying premiums of less than $107,000 per year. It is that potential injury that must rationally be related to a punitive damage award of $5 million.

Finally, respondents attempt to suggest that this case bears no relation to the pending *TXO* case. Br. in Opp. 26-27. But pointing to minor factual differences between the cases does nothing to undercut the fundamental reality: this case, like *TXO*, involves the claim that a corporation was exposed to a constitutionally excessive penalty for a minor commercial tort, because of its wealth. It is therefore plainly appropriate to defer disposition of this case pending *TXO*, if the Court decides not to grant review at this time.

Respectfully submitted,

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